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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CHARLES J. REICH,
v. *Petitioner,*

MARCUS E. COLLINS AND
THE GEORGIA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Georgia

BRIEF OF COMMITTEE ON STATE TAXATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Committee on State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and

promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Georgia, and thus have a particular interest in the ultimate settlement of the remedial landscape of Georgia. However, COST's concern with this case is both more abstract and more universal—the Due Process issues raised by this case are of national concern. This case is representative of several others, including *Harper v. Virginia Dept. of Taxation*, 509 U.S. —, 113 S. Ct. 2510 (1993)¹, wherein States have been attempting to avoid liability for refunding taxes successfully challenged as being unconstitutional without resort to—or with clear disregard of—the standards for relief set forth by this Court in *Harper and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990). Such behavior on the part of the States impacts the remedy for every type of unconstitutional tax. See, e.g., *Norwest Bank Duluth, National Association (formerly First National Bank of Duluth) v. John P. James, Commissioner, Dept. of Revenue, State of Minnesota*, Minn. S. Ct. No. CO-89-2097 (April 1, 1994) (banks challenging income tax discriminating against federal obligations); *James B. Beam Distilling Co. v. Georgia II*, 263 Ga. 609, 437 S.E.2d 782 (1993), appeal filed, 62 U.S.L.W. 3503 (No. 93-1140, January 13, 1994) (liquor distributors challenging excise tax discriminating against out-of-state products). Therefore, COST has an interest in this case.

¹ On remand to the Virginia courts for determination of the question whether Virginia provided a constitutional sufficient remedy, the Alexandria Circuit Court followed Georgia's lead in identifying two alleged predeprivation remedies that precluded a requirement of paying refunds to federal retirees. *Harper v. Virginia Dept. of Taxation*, Alexandria Cir. Ct. Law Nos. CL891080, 890462, 890463, and 891081 (Jan. 7, 1994).

SUMMARY OF ARGUMENT

"Nothing in life is certain," but the Constitution embodies language designed to make some things less uncertain. The Fourteenth Amendment guarantees a minimum level of "due process." The Due Process Clause embodies guiding principles for conduct of the States with respect to those over whom they exercise jurisdiction, including the principles of certainty, fairness, balancing of interests (the State's and the individual's), and respect for property rights. All four of these principles are implicated by the structure and operation of a State's taxation and remedial schemes.

This case presents the clearest evidence that when faced with a State's fiscally grounded arguments against providing relief, many State courts will disregard the basic tenets of Due Process in order to avoid paying refunds to a taxpayer who has *successfully* challenged a state tax before this Court. The Georgia Supreme Court's response to the adversely impacted taxpayers in this case has itself been violative of Due Process in at least two respects. First, by (i) refusing to acknowledge the duress which attaches to any alleged predeprivation remedies by operation of other Georgia laws, and (ii) denying the applicability of the postdeprivation refund statute to taxes later found to be unconstitutional, the Court tilts the scales balancing State and taxpayer interests completely in its favor and deprives taxpayers of the "clear and certain" remedy to which they are entitled under Due Process. Second, by relying on the taxpayers' use of a post-deprivation remedy (the refund statute) and failure to pursue predeprivation relief to subsequently deny the taxpayers a remedy to an unconstitutional tax, the Court in effect denied the taxpayers a meaningful opportunity to challenge the tax without adequate notice. This violation of Due Process is particularly offensive because the Court issued an earlier specific ruling to the Georgia retirees in question that the refund statute was the appropriate recourse for the injury

suffered by them, as opposed to the predeprivation relief actually sought.

This Court should not defer to the interpretation of state taxation schemes by state courts where such courts either consciously disregard or purport insincerely to apply Due Process principles in such a way as to achieve a predetermined result, *i.e.*, the denial of refunds to taxpayers who have been subject to an unconstitutional tax. An analogy may be found in the area of integration of public schools. In *Harrison v. NAACP*, 360 U.S. 167 (1959), this Court recognized the unfairness of allowing state courts to interpret laws of the State in such a manner as to impede integration and to nullify the effect of its holding in *Brown v. Board of Education*, 347 U.S. 483 (1954):

Of course Virginia courts were not parties to the formulation of that legislative program. But they are interpreters of Virginia laws and bound to construe them, if possible, so that the legislative purpose is not frustrated. Where state laws make such an assault as these do on our decisions and a State has spoken defiantly against the constitutional rights of the citizens, reasons for showing deference to local institutions vanish. The conflict is plain and apparent; and the federal courts stand as the one authoritative body for enforcing the constitutional rights of the citizens.

Harrison, 360 U.S. at 182. COST is not suggesting the use of federal courts as courts of original jurisdiction in state tax cases; but COST is suggesting that very clear and very certain guidelines be set out for use by state courts in remedy cases.

ARGUMENT

I. FOUR HISTORICAL CONCERNS UNDERLYING THE CONSTITUTIONAL MANDATE OF THE DUE PROCESS CLAUSE ARE CLEARLY IMPLICATED BY THIS CASE

Amendment 14, sec. 1 of the United States Constitution forbids any State to "deprive any person of life, liberty, or property, without due process of law." At least four concerns underlie this expression of the limitation on States' power: (1) certainty, (2) balancing of interests, (3) fairness, and (4) respect for property rights.

First, Due Process embodies the need for certainty in the system. A well-ordered and stable society is founded on (i) the due provision of notice concerning one's rights and responsibilities, and (ii) consistency in the fact and manner of application and enforcement of such rights and responsibilities. Because government, both State and federal, determines the parameters of an individual's rights and responsibilities (presumably within the context of other constitutional restraints), it is paramount that government also enable individuals to function within these parameters. For instance, "[i]t is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Rose v. Locke*, 423 U.S. 48, 49 (1975) (citations omitted). Furthermore, "[t]he principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation. . . ." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927). Justice Holmes identified this "reasonable certainty" in the context of taxpayers' and States' rights vis-a-vis each other in tax controversies:

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The

rule being established that apart from special circumstances he cannot interfere with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 285 (1912). The need for certainty becomes more obvious as the number of paths alleged to be available to an individual to either comply with a statutory requirement or to challenge it increases.

Second, Due Process incorporates a balancing principle, as between the interests of the State and the individual. There may be a deprivation of either life, liberty, or property, so long as this deprivation is accomplished in accordance with legal procedures that permit the individual to contest the deprivation. With respect to the appropriate manner of effecting deprivations, this Court has affirmed that

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976) (citations omitted). In the context of state taxes, the interests to be balanced include the orderly administration of revenue laws (the State), the conservation of the public fisc (the State), the right to notice of assessment (the taxpayer) and the opportunity to challenge a proposed or actual assessment (the taxpayer).

Third, the Due Process Clause embodies the basic notion that a civilized and regulated society must enforce "our traditional conception of fair play and substantial justice" against a State's conduct toward its citizens, taxpayers, and others with "presence" in the State. *International Shoe Co. v. Washington*, 326 U.S. 310, 317-320 (1945). See also *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1941); and *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949). Nothing could be more violative of the concept of fairness than to permit a State to retain revenues from a tax that it should not have imposed or collected in the first place.

Fourth, Due Process incorporates the Framers' respect for individual tangible and intangible property rights. The Court has acknowledged this significant concern with respect to state taxes: "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exaction in order to satisfy the commands of the Due Process Clause." *McKesson*, 110 S. Ct. at 2250. It is critical to note that in all spheres other than taxation, the "'root requirement'" of Due Process is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted); *McKesson*, 110 S. Ct. at 2250.

These four concerns have been distilled into the requirements set forth in *Atchison* and *McKesson*, that a taxpayer aggrieved by an unconstitutional tax must have a clear and certain remedy.

II. DUE PROCESS REQUIRES A PARTICULAR SENSITIVITY TO POST-PAYMENT CHALLENGES TO A TAX

In state tax cases dating back to the turn of the century, this Court has consistently recognized and accommodated the respective needs of States and taxpayers, to

ensure the integrity of the public fisc through collection of tax revenues, and to be provided meaningful opportunities to challenge taxes on permissible grounds with the assurance that Due Process will be accorded such challenges. In *McKesson*, this Court held that Florida was entitled to "employ various financial sanctions and summary remedies" designed to protect the State's interest in financial stability:

Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls and by making the ultimate collection of validly imposed taxes more difficult.

Id. at 2250.

Nevertheless, Due Process requires a particular sensitivity to post-payment challenges to a tax precisely because the State may deny a predeprivation opportunity to contest that tax or so limit its purported predeprivation remedies as to make them meaningless. The taxpayer is entitled to Due Process in terms of a clear, certain and fair remedy in the event the tax paid was invalid:

[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id. at 2247.

"Bait and switch" tax challenge schemes and remedial "shell games" *ipso facto* violate both the spirit and substantive principles of Due Process. In this instance, Georgia has said that its refund statute is inapplicable, and there are no other postdeprivation remedies; however, as Petitioner shows, none of the purported predeprivation remedies are free of duress and hence are not clear and

certain. Not only is the Georgia Supreme Court's behavior in the current case an egregious example of a "[fiscal] ends justifies the means" jurisprudence, but it cannot square with the four Due Process principles—certainty, fairness, balancing and respect for property rights—that this Court vigorously espoused in *McKesson* and its other Due Process jurisprudence, and reaffirmed most recently in *Harper*. Where sanctions are instituted which effect a significant deprivation of property, *e.g.*, the pre-contest payment of taxes alleged due to the State, and as a result there is no possibility of a pre-payment challenge to the validity of the tax in question, the State cannot thereafter tilt the scale completely and unjustly in its favor by refusing to provide meaningful backward-looking relief upon a successful post-deprivation challenge.

III. DUE PROCESS ADEQUATE NOTICE AND ACCOUNTABILITY ARE LACKING WHERE THE GEORGIA SUPREME COURT HAS DECLARED THE REFUND STATUTE INAPPLICABLE TO UNCONSTITUTIONAL TAXES, IN THIS CASE

Your *amicus* respects this Court's restraint of its powers of review. Certiorari was granted in this case on only one of the two questions presented by Petitioner; the question not certified for review was: "Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief." The manner in which a State's highest court chooses to interpret its own body of laws as applied to its citizens and those over which it has constitutional (*i.e.*, Due Process) jurisdiction may well command deference on the part of all other judicial bodies, including this Court. However, there is an underlying issue to be inferred from the above question presented, which is the cause of the greatest concern to COST and other taxpayers throughout the country:

Whether reliance by a State on a taxpayer's use of a post-deprivation remedy to later deny the taxpayer a remedy to an unconstitutional tax in effect violates Due Process because the State has denied the taxpayer a meaningful hearing without adequate notice.

The Georgia Supreme Court's remarkable interpretation of the scope of its refund statute as not being applicable to unconstitutional taxes, but only to "erroneously or illegally assessed" taxes, O.C.G.A. § 48-2-35, may withstand the very basic and lenient scrutiny applied by this Court when reviewing such cases. *Cf. Bell v. State of Maryland*, 378 U.S. 226, 237 (1964) (Court declined to decide applicability of saving clause as matter of Maryland law, in light of a post-challenge change to the statute, because "[s]uch a course would be inconsistent with our tradition of deference to state courts on questions of state law"). However, the unfair result wrought by such an interpretation cannot be deemed to pass Due Process muster. Denying the taxpayer the use of a refund statute that was available at the time the taxpayer committed to a choice of remedies² injects the highest degree of uncertainty into the State's tax procedures, is blatantly unfair, serves no legitimate state tax administrative need (nor any need other than retention of illegally collected taxes), and evinces a total disregard for the taxpayer's property rights.

At least one State supreme court has come to understand and enforce this principle. In *Norwest Bank Duluth*, the Minnesota Supreme Court was forced to address whether that State provided a "meaningful predeprivation remedy" to banks challenging a state tax on income from federal obligations, in light of *Harper* and *McKesson*. The Court concluded that its prior refusals to grant refunds to banks, even though the taxation scheme had been ac-

² A refund claim filed under O.C.G.A. § 48-2-35, which the Georgia Supreme Court had stated on previous occasions was one of the available remedies. See, e.g., *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E.2d 74, 75 n.1 (1989).

knowledgeed unconstitutional, was wrong for two reasons. First, no meaningful predeprivation remedy existed for those petitioners, under the facts of the case. Second, inadequate notice was provided to the banks that their course of action would result in forfeiture of the opportunity to be heard and to challenge the tax:

The existence of the tax refund statute in Minnesota provides further support for our decision. *To rely on the banks' use of the refund statute to now deny them a remedy would effectively deny the banks a meaningful hearing without adequate notice.* Prior to the *McKesson* decision, taxpayers had no notice that they were required to take advantage of any predeprivation procedures in order to qualify for a refund. Even if there was a predeprivation procedure in 1980, the banks did not know when they chose between filing for a refund in district court and filing in tax court, that in choosing a refund action, they were foreclosing their right to recovery.¹¹

[Footnote 11: *That issue did not arise in McKesson itself because the Court there found that taxpayers did not have a meaningful predeprivation remedy, thus a remedy was due regardless of whether it was required under Florida's tax refund statute.*]

Norwest Duluth, Slip Opin. at 11 (emphasis added). The Due Process principle identified by the Minnesota Supreme Court that is equally compelling in this case is that a taxpayer is entitled to adequate notice of the procedures which they will be expected to follow, in order to challenge the constitutionality of a tax and be entitled to relief.

If anything, the facts in this case are more reprehensible than those with respect to which the Minnesota Supreme Court has recognized and rectified an unfairness to taxpayers. To be told on one occasion, as Georgia retirees were told by the Supreme Court of the State,³

³ *Collins v. Waldron*, *supra*.

that the refund statute was the appropriate recourse for the injury alleged *and* the various methods of predeprivation relief pursued were *not* appropriate, and subsequently to be told that (i) the refund statute does not apply to the injury suffered by retirees and (ii) predeprivation remedies foreclosed the requirement that refunds be provided, is offensive to all notions of Due Process, both aboriginal and jurisprudential. As confusing as this might be to a sophisticated corporate taxpayer, equipped with either professional staff or retained counsel, it must be utterly incomprehensible to individual taxpayers, who have been told that they are right but are now the victims of the bait and switch tactics of the Georgia tax administrators and courts.

This Court is being called upon to enforce the strict and nondeviating application of remedial guidelines set forth in *Harper* and *McKesson*, which guidelines are derived directly from absolute constitutional Due Process tenets. This case presents but one example of the compelling need for this Court to call State courts to heel; just as accountability is demanded of the taxpayer in its dealings with the State, fairness requires that the State be held to the same level of accountability.

CONCLUSION

For the reasons set forth above, the Committee on State Taxation respectfully requests that the decision of the Georgia Supreme Court in this case be reversed, and that the Georgia Supreme Court be ordered to restore the taxpayer to the same economic condition that the taxpayer would have been in, had the tax not been paid in the first place.

Respectfully submitted,

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